

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PAUL JEFFREY SALERNO,

Defendant-Appellant.

UNPUBLISHED

April 10, 2014

No. 313115

Wayne Circuit Court

LC No. 11-010648-01-FH

Before: M. J. KELLY, P.J., and CAVANAGH and FORT HOOD, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of assault with a dangerous weapon (felonious assault), MCL 750.82. He was sentenced to one-year of probation. Defendant appeals by right, and we affirm.

Defendant, a landlord, owned an apartment building. Sharon Denise Smith and Robert Reeves alleged that Smith lawfully occupied an apartment in defendant's building, and defendant unlawfully attempted to remove her from the premises. The police were called to the apartment, and Reeves left the premises. The police and defendant also left the apartment building. Defendant learned from other tenants that Reeves came back to the apartment. Defendant and his employees returned to the building. Smith and Reeves alleged that defendant busted through the door and assaulted Reeves, who picked up a metal pipe to protect himself. On the contrary, defendant alleged that he pushed open a makeshift door and was attacked by Reeves with a metal pipe. Defendant testified, and Reeves agreed, that defendant pushed Reeves to the ground. Reeves testified that defendant struck him with a metal flashlight, an assertion that defendant denied. Defendant's employee entered the apartment and took the metal pipe from the "tussling" men. Reeves averred that he was repeatedly struck by defendant. Defendant testified that Reeves bit him, causing him to punch Reeves twice. Defendant contended that Reeves voluntarily offered to leave the apartment if defendant would stop hitting him. Defendant was charged¹ with assault with intent to do great bodily harm less than murder, MCL 750.84, assault with a dangerous weapon (felonious assault), MCL 750.82, and misdemeanor aggravated assault,

¹ The charge of first-degree home invasion was dismissed before trial and is not at issue in this appeal.

MCL 750.81a. Following a bench trial, defendant was solely convicted of felonious assault and sentenced to one-year of probation.

Defendant's challenge on appeal involves the trial court's failure to allow closing arguments. After two days of testimony, the trial judge advised the parties that it was adjourning the matter to review the medical records and for closing arguments. However, when the case resumed on the date scheduled, the trial judge began to read her factual findings into the record. Although the prosecutor interjected to provide the name of a witness, neither party advised the court that closing arguments had not occurred. The parties did not waive closing arguments on the record and did not object to the failure to provide the opportunity for closing arguments. After defendant was convicted of felonious assault, counsel filed a motion for new trial. In this motion, defendant alleged that his due process right to a fair trial was violated and he was deprived of the effective assistance of counsel because of the failure to allow closing arguments. The trial court denied the motion for new trial in an opinion and order, holding that defendant failed to demonstrate plain error affecting his substantial rights and outcome determinative error did not occur for purposes of the claim of ineffective assistance.

On appeal, defendant contends that the failure to allow for closing argument constitutes a denial of his due process right to a fair trial and the effective assistance of counsel. We disagree. "The trial court's decision regarding a motion for a new trial is reviewed for an abuse of discretion." *People v Leonard*, 224 Mich App 569, 578; 569 NW2d 663 (1997). The reasons for the grant or denial of the motion must be examined by this Court. *Id.* at 580. If the reasons given by the trial court are "inadequate or not legally recognized," an abuse of discretion has occurred. *Id.* "Whether a defendant received ineffective assistance of trial counsel presents a mixed question of fact and constitutional law." *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011). "This Court reviews for clear error a trial court's findings of fact and de novo its conclusions of law." *People v Douglas*, 296 Mich App 186, 199-200; 817 NW2d 640 (2012). "To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness and that there exists a reasonable probability that, absent counsel's errors, the result of the proceeding would have been different." *Id.* at 200. "There is a presumption that defense counsel was effective, and a defendant must overcome the strong presumption that counsel's performance was sound trial strategy." *People v Johnson*, 293 Mich App 79, 90; 808 NW2d 815 (2011). The burden of establishing the factual predicate for a claim of ineffective assistance is on the defendant. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). A defendant may not give cursory treatment to an issue, but must cite applicable authority, and the failure to meet this burden constitutes abandonment of the issue. See *People v Schumacher*, 276 Mich App 165, 178; 740 NW2d 534 (2007); *People v Sowders*, 164 Mich App 36, 49-50; 417 NW2d 78 (1987).

Both federal and Michigan case law hold that the failure to allow closing arguments constitutes a denial of due process. See *Herring v New York*, 422 US 853, 859; 95 S Ct 2550; 45 L Ed 2d 593 (1975); *People v Thomas*, 390 Mich 93, 94-95; 210 NW2d 776 (1973). However, since those cases were decided, both federal and Michigan case law have applied the plain error

rule to claims of unpreserved, constitutional error.² See *United States v Olano*, 507 US 725, 731; 113 S Ct 1770; 123 L Ed 2d 508 (1993); *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). In *Carines*, 460 Mich at 761-762, our Supreme Court explained the reason for the plain error doctrine:

This state encourages litigants to seek a fair and accurate trial the first time around. . . . This Court disfavors consideration of unpreserved claims of error . . . We noted that a rule of automatic reversal would conflict with MCL 769.26; MSA 28.1096, which provides that judgments or verdicts shall not be reversed absent a miscarriage of justice. We also observed that Michigan has long recognized the importance of preserving issues for appellate review. The United States Supreme Court has acknowledged the importance of this policy and the right of the various states to impose preservation requirements. Trial is by far the best time to address a defendant's constitutional and nonconstitutional rights. Indeed, the United States Supreme Court has recognized a state's right to develop procedural rules that lead to issue forfeiture even where the procedural rules implicate constitutional protections if the rules serve a legitimate state interest. [*Id.* (case citations and punctuation omitted, emphasis deleted).]

Forfeiture is the failure to timely assert a right. *Id.* at 762 n 7. Waiver in the “intentional relinquishment or abandonment of a known right. *Id.* (citation omitted). The failure to object deprives the “court of the opportunity to correct the error at the time it occurs.” *People v Vaughn*, 491 Mich 642, 673-674; 821 NW2d 288 (2012).

In the present case, defendant forfeited the error by failing to object or interject when the trial court commenced with its factual findings. “[A] constitutional right may be forfeited by a party’s failure to timely assert that right.” *Carines*, 460 Mich at 763. “To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights.” *Id.* The determination, whether plain error affected substantial rights, involves a showing of prejudice. *Id.* That is, the error must have affected the outcome of the proceedings. The defendant has the burden of persuasion with regard to the prejudice requirement. *Id.* If a defendant establishes these three requirements, the appellate court nonetheless must exercise its discretion in determining whether reversal is appropriate. *Id.* “Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error ‘seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings’ independent of the defendant’s innocence.” *Id.*

² The trial court recognized the authority cited by defendant, but noted the application of the plain error doctrine. On appeal, defendant does not address the trial court’s application of the plain error doctrine or present contrary legal authority. Despite the failure to challenge the trial court’s rationale, we nonetheless address the merits of the appeal. *Schumacher*, 276 Mich App at 178; *Sowders*, 164 Mich App at 49-50.

In the present case, the trial court found that reversal was unwarranted because the error did not result in the conviction of an actually innocent defendant and did not impact the fairness, integrity, or public reputation of the judicial proceedings. The lower court's factual findings are reviewed for clear error. *Douglas*, 296 Mich App at 199-200.

In light of the record, it cannot be concluded that the trial court abused its discretion by denying defendant's motion for a new trial. *Leonard*, 224 Mich App at 578. Here, there is no indication that the trial court would have deprived counsel of the opportunity to give closing argument if the request had been made. Irrespective of Smith's status in the apartment, Reeves admitted that he was not a party to any lease of the apartment at issue. The police had been to the apartment on two previous occasions. Smith and Reeves were apparently advised that they had to leave the premises by defendant and the police, but defendant admittedly did not resort to court action when they did not voluntarily leave. Rather, defendant chose to engage in a confrontation. Although Smith and Reeves contended that defendant busted through the door, the door apparently was a makeshift door. After defendant entered the apartment, defendant and Reeves fought. Although Reeves tried to bite and assault defendant with a metal pipe, defendant bested him, perhaps with a metal flashlight. The trial court examined the credibility of the witnesses and the medical evidence before concluding that defendant did not have the requisite intent to do great bodily harm. Rather, defendant was acquitted of two counts of assault, and convicted only of felonious assault. Although defendant asserted that he acted in self-defense, he acknowledged entering into the apartment and engaging in a tussle with Reeves. In light of the evidence and the court's factual findings, plain error affecting substantial rights did not occur; an actually innocent defendant was not convicted and the propriety of the judicial proceeding was not impacted. *Carines*, 460 Mich at 763. The trial court appropriately denied the motion for new trial. *Leonard*, 224 Mich App at 578.

Although defendant contends that trial counsel was ineffective, the trial court held that, even if counsel was ineffective, it was not outcome determinative error. *Douglas*, 296 Mich App at 199-200. We agree with the trial court. In light of defendant's admission that he did not obtain a court order to enter the premises and deliberately engaged Reeves, the outcome was resolved in light of the credibility of the witnesses and the medical records, and it cannot be concluded that defense counsel was ineffective. Accordingly, defendant is not entitled to appellate relief.

Affirmed.

/s/ Michael J. Kelly
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood